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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-646

TWC HOLDINGS, INC.,

Petitioner,

v.

JOHN F. HARKINS CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

In a case where the parties to a construction subcontract disagreed over the interpretation of a provision binding the subcontractor to the provisions of the contractor's principal contract with the owner "to the same extent" that the contractor is bound, was the District Court's finding, on the basis of the evidence submitted, that the parties intended by that provision for the terms of the principal contract to limit the subcontractor's rights and remedies against the contractor under the subcontract, including rights of arbitration, subject to appellate review under the clearly erroneous rule?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, TWC Holdings, Inc., then known as The Waldinger Corporation, Inc., and the respondent John F. Harkins Company, Inc.

Respondent John F. Harkins Company, Inc. has no parent company, subsidiaries or affiliates to list pursuant to Rule 28.1.

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STATEMENT OF THE CASE

The instant Petition asks this Court to issue a writ of *certiorari* to review the determination by the courts below that under the particular agreement and facts presented, a contractor in the construction industry protected itself from the risk, exposure and cost of inconsistent or conflicting rights and remedies in its principal contractual relationship with the owner, on the one hand, and its separate subcontractual relationship with subcontractors, on the other hand, by limiting its subcontractors' arbitration and other rights by the terms of its principal contract with the owner.

Respondent John F. Harkins Co., Inc. ("Harkins") is a mechanical contractor and, as such, enters into principal contracts with owners for the installation of heating, ventilating, air conditioning and/or plumbing systems on numerous construc-

tion projects. After being awarded a contract, Harkins frequently subcontracts parts of the work, and utilizes its own form subcontact for that purpose.

The principal contracts that Harkins enters into with owners inevitably contain differing rights, duties and remedies. Using the issue of arbitration involved in this case as one of numerous possible examples, certain principal contracts may provide that any dispute which the parties cannot resolve must be arbitrated; other principal contracts may provide for arbitration rights regardless of the nature of the dispute; while others may provide for arbitration only for certain types of disputes.

Given the impossibility of foreseeing and specifically providing in advance for the infinite variety of terms and conditions that different principal contracts may impose, and to protect against finding itself on any particular project in the untenable situation of having inconsistent or conflicting rights, duties and remedies under its principal contract and subcontracts, Harkins' form subcontract sets out in general terms its legal relationship with its subcontractors, but expressly stipulates that to the extent the rights or remedies of subcontractors set forth in the subcontract differ from those of Harkins against an owner under a principal contract, the subcontractor is to be bound by the terms of the principal contract. This critical protective proviso is set forth in Paragraph 2 of this subcontract form:

> *SUBCONTRACTOR shall be bound by* all provisions of these documents and also by applicable *provisions of the PRINCIPAL CONTRACT* to which CONTRACTOR is bound, *and to the same extent.* [(A8) [1] (italics added).]

Such protection is particularly important with respect to remedies because in the construction industry, the scheduling and work of contractors and their subcontractors is subject to the control of the owner, resulting in the contractor usually having a "pass through", or right over, against the owner for

[1] References are to the Appendix to the Petition.

claims which the contractor's subcontractors assert against it. Thus, a contractor who might be generally agreeable to arbitration with its subcontractors, but who wants to avoid the possibility of being required to litigate in court against the owner the "pass through" of a subcontractor's claim which is subject to arbitration, must make sure its subcontractors have no greater arbitration rights against it than it has against the owner.

Here, Harkins was one of several prime contractors on a construction project under a contract with the Owner to install heating, ventilation and air conditioning systems ("the Principal Contract"). Harkins awarded Petitioner TWC Holdings, Inc., then known as The Waldinger Corporation ("Waldinger"), a subcontract, using Harkins' standard subcontract form, for the sheetmetal ductwork for those systems ("the Subcontract"). Prior to execution of the Subcontract, Waldinger proposed many additions and changes to Harkins form subcontract. One of Waldinger's proposed amendments to which Harkins agreed was the addition to critical Paragraph 2 of the following language: "Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor which Contractor has against . . . the Owner under the Contract Documents." (A10-A11). Waldinger's Petition inexcusably fails to even make reference to the fact of this amendment, which was one of the bases of the District Court's finding.

Prior to the completion of the project, Waldinger initiated an arbitration proceeding against Harkins for damages. As jurisdictional grounds for the arbitration, Waldinger cited an arbitration provision in Paragraph 17, while ignoring Paragraph 2, of the Subcontract. Harkins then commenced the present action seeking (a) damages of its own, (b) a declaratory judgment that, because Harkins could not arbitrate against the Owner under the Principal Contract the "pass through" of Waldinger's claims, those claims were not arbitrable under the terms of the Subcontract, and (c) injunction of the arbitration.

Both parties then filed motions and affidavits with respect to the arbitration which Waldinger had initiated, Harkins seeking to enjoin the arbitration and Waldinger seeking to stay this action while the arbitration proceeded.

After a hearing, the District Court entered a Decision (A27) finding as a fact that, at the time the Subcontract was entered, Waldinger and Harkins mutually understood and intended that by virtue of Paragraph 2, the provisions of the Principal Contract were a limitation upon Waldinger's rights and remedies against Harkins, and, with respect to arbitration, "the correct interpretation bars Waldinger from arbitrating disputes under the Subcontract if Harkins could not do the same under the Primary Contract." (A48-A51). The District Court therefore entered an Order granting Harkins' motion to enjoin the arbitration and denying Waldinger's motion to stay the action below. (A54). No injunction *per se* was ever entered.

On appeal, the Third Circuit affirmed, concluding that under the facts of this case, the District Court's finding that the parties intended by their Subcontract that Waldinger could only arbitrate disputes against Harkins "to the same extent" that Harkins could arbitrate those disputes against the Owner under the Principal Contract was not clearly erroneous, and that the District Court committed no error in reaching its legal conclusion that the parties' disputes did not come within the scope of that arbitration agreement.[2] Although it contested the point below, Waldinger now concedes that the legal conclusion that the parties' claims would not be arbitrable under the terms of the Principal Contract was correct. (Petition, 4).

REASONS FOR DENYING THE WRIT

1. THIS CASE INVOLVES NO ISSUES WHICH ARE OF NATIONAL SIGNIFICANCE OR ARE LIKELY TO AFFECT OTHERS, AND THE OPINION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS

Waldinger's portrayal of the Third Circuit's Opinion as involving issues of great national importance that will affect significant numbers of other persons or businesses, and as being

[2] The reported Opinion of the Third Circuit, 796 F.2d 657, contains a correction to the slip Opinion in the Appendix attached to the Petition, *viz.*, the word "Waldinger" in the first line of the last paragraph on page A3 of the Appendix is corrected to "Harkins".

in conflict with decisions of this Court and other Circuits, is based on an inaccurate and incomplete statement of the case, a misreading or misdescription of the decisions which it relies upon, and generous dosages of hyperbole.

The Opinion below involved only review of District Court findings, based on the facts presented, as to what private parties meant by particular language in their individual Subcontract. The Subcontract language interpreted by the District Court seemingly is unique, at least to the extent that neither party adduced any evidence that the principal provision in question here (Paragraph 2) commonly appears in construction contracts or other types of contracts, nor was able to cite any other case involving that provision. Once the District Court determined the factual issue of what the parties understood and intended that provision of the Subcontract to mean, the legal issue of whether the parties' disputes were within the scope of the parties' arbitration agreement followed easily, and is not contested by Waldinger.

Moreover, contrary to Waldinger's contentions, the decisions of this Court and other Circuits cited not only are not in conflict with the Opinion of the Third Circuit below, but do not even address the issue that was presented here. This point is discussed in more detail at pp. 8-21, *infra*.

2. SUPREME COURT REVIEW WOULD NOT BE APPROPRIATE BECAUSE THE RECORD UPON WHICH THE PETITION IS PREDICATED IS MISLEADING, INCOMPLETE AND DOES NOT PROVIDE A SOUND FOUNDATION FOR A DECISION

Under Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, a federal court action may be stayed in favor of arbitration only if the action involves an issue "referable to arbitration under an agreement in writing". The only written agreement providing for arbitration of its disputes with Harkins which Waldinger has ever claimed exists is the Subcontract.

Unfortunately, however, Waldinger has not been entirely candid in these proceedings, for at the very time it relies in this action and in this Court upon the Subcontract as a written

agreement providing for arbitration, it is, without disclosing the fact here, taking the position in a separate federal court action that the Subcontract between it and Harkins is not binding or enforceable.

On May 2, 1986, nearly a year after this action was commenced by Harkins, and just one month before oral argument in the Third Circuit, Waldinger filed an action in the United States District Court for the District of New Jersey against Harkins' surety, Reliance United Pacific Insurance Company ("Reliance"), asserting that under the payment and performance bonds which Reliance had issued, it was liable to Waldinger for any damages awarded against Harkins in the arbitration proceeding which Waldinger had commenced against Harkins.[3] *The Waldinger Corporation v. Reliance United Pacific Insurance Company,* C.A. No. 86-1721. Harkins was not named as a party to that action. On October 22, 1986, just two days after filing its instant petition in this Court, Waldinger served upon Reliance answers to Reliance's Interrogatories in that action. Interrogatory 18 requested Waldinger to "identify and attach all documents which represent the construction Subcontract (at the time originally executed) between Harkins and you for construction of the Project." Waldinger's answer to that Interrogatory is as follows:

> *Response:* The original agreement between Waldinger and Harkins is set out in John Harkins' letter of December 16, 1983, signed as accepted by Gary Mitchell that day. This agreement together with documents referenced in this agreement appear in Exhibit 9-1 to these answers. Waldinger and Harkins subsequently *attempted* to enter into a more detailed subcontract agreement using Harkins' subcontract form. The terms "subcontract" or "Waldinger's subcontract" or the "Waldinger/Harkins subcontract", as used in these answers, and as used by

[3] Waldinger did not disclose in the Complaint against Reliance that this action was pending and that the arbitration proceeding had already been enjoined.

> Waldinger on the project, referred to the documents set out in Exhibit 1A to these answers [the Subcontract]. These documents reflect *an attempt* by Waldinger and Harkins to enter into an enforceable contract. There was apparently not a meeting of the minds, however, between Waldinger and Harkins concerning the extent to which Waldinger was bound, under the documents set out in Exhibit 1A, to the terms and conditions of Harkins' contract with the Owner. Furthermore, any agreement by Waldinger to the terms and conditions of the documents set out in Exhibit 1A was based on reliance upon certain material misrepresentations made by Harkins in the negotiation process. These misrepresentations are explained in detail elsewhere in these answers. *Accordingly, Waldinger is maintaining* ***in the alternative*** *that (a) if there is a formal contract for this project between Waldinger and Harkins,* ***other than*** *the December 16, 1983 letter agreement* (in Exhibit 9-1) *and the August 1, 1984 Memorandum of Understanding* (In Exhibit 9-3), it is memorialized by the documents set out in Exhibit 1A; . . . . [Italics and boldface added.]

Thus, at the very same time that Waldinger is seeking to persuade this Court to rule in this case that its disputes with Harkins must be arbitrated under the Subcontract, it is *denying* (except "in the alternative") in a separate federal action involving the exact same subject matter that the very same Subcontract document constitutes an agreement between the parties. These contrary positions by Waldinger raise serious questions as to the viability of any ruling this Court might make if a writ were granted in this case, since, if this Court were to reverse the Third Circuit's decision, the entire record on the arbitration issue would certainly have to be reopened on remand to examine, *inter alia,* whether the *sine qua non* for compelling arbitration in this or any other case—*viz.* that "an agreement in writing for such arbitration" exists, 9 U.S.C. § 3—has been satisfied by Waldinger.

Given the recent revelation of Waldinger calling into question the legal significance of the very Subcontract document upon which it must and does rely to establish a right to arbitration, Harkins respectfully submits that the Petition rests upon a record too uncertain and shaky to merit this Court's review.

3. THE PETITION'S PRINCIPAL CLAIM THAT THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *CONE* IS ERRONEOUS

The principal reason which Waldinger advances for granting the writ is its claim, repeated throughout the Petition, that the Third Circuit's Opinion is in "direct conflict" with this Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1 (1983). In support of its claim of a direct conflict, Waldinger quotes and relies upon the following language as being the "clear holding" of *Cone* (Petition, 7-8):

> Although our holding in *Prima Paint* extended only to the specific issue presented, the Courts of Appeals have since consistently concluded that questions of arbitration must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Waldinger claims that the Third Circuit's decision below is in "direct conflict" with that "clear holding" in two respects. First, Waldinger asserts that the Third Circuit held that district courts are not bound by *Cone* where, in attempting to ascertain the "existence, scope and legal effect" of an agreement to arbitrate, the district court is "interpreting the language of the contracts [and] performing a fact finding function". (Petition, 7-8). Second, Waldinger argues that the Third Circuit "refused

to adhere to *Cone's* mandates" when it declined to "implement the federal policy favoring arbitration outside the context of labor environments." (Petition, 18). However, Waldinger's premises for asserting that the Third Circuit's decision conflicts with *Cone* are erroneous.

(a) The Language Relied Upon From *Cone* Is *Dictum*.

Contrary to Waldinger's assertions, the above language which it relies upon from *Cone* was not the *ratio decidendi* of the case, but was *obiter dictum*.

The issue presented to and decided by this Court in *Cone* was *not* the arbitrability of the underlying dispute. That point was conceded by the party which had sought to avoid arbitration, as this Court expressly noted. 460 U.S. at 29 ("In this Court, the Hospital does not contest the substantive correctness of the Court of Appeals' holding on arbitrability".) The sole issues presented for decision and decided in *Cone* were (i) the "propriety of the District Court's decision to stay a federal suit [seeking an order compelling arbitration] out of deference to the parallel litigation brought in state court action," 460 U.S. at 13, and (ii) the propriety of the procedures employed by the Court of Appeals in considering and deciding the case, 460 U.S. at 29.

Since the language from *Cone* relied upon by Waldinger is *dictum, certiorari* would not be necessary even if Waldinger's claim that the Third Circuit's decision conflicts with that language were correct (which it is not, see pp. 10-13, 15-16, *infra*).

That the above-quoted *Cone* language is *dictum* also disposes of Waldinger's assertion that a writ should be granted to review the Third Circuit's alleged "refusal" to apply that language beyond the environment of labor arbitration.[4] In fact, however, the Third Circuit did not "refuse" to apply the *Cone* language outside the labor environment, but merely stated it

[4] Waldinger also cites *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985), and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), as cases in which this Court referred to the *Cone* language approvingly in commercial contexts. However, just as in *Cone*, the Court's references in both cases also were *obiter dictum*.

was "uncertain" that arbitration is afforded such a stated preference beyond the environment of labor arbitration (A13), which hardly merits Supreme Court review.[5]

(b) In Any Event, The Third Circuit's Decision Is Not In Conflict With The Cited Language Of *Cone*

Even if the language of *Cone* relied upon by Waldinger were not *dictum* and were deemed to apply outside labor grievances under collective bargaining agreements, the decisions of the lower courts here still would not be in conflict.

The point that Waldinger overlooks or misapprehends is that the *Cone* language refers to the "scope of arbitrable issues", *i.e.*, the question or construction of what issues are arbitrable under or encompassed by a *given* arbitration agreement. Indeed, every case cited by Waldinger for the proposition that doubts concerning the scope of arbitrability should be resolved in favor of arbitration involved a contract where the contours of the arbitration agreement were undisputed. At most, the question in such cases was the legal construction, or effect, to be given the agreement.

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[5] Moreover, although not necessary for denying the Petition, it should be noted that the *Cone* language relied upon by Waldinger emanates, as the Third Circuit indicated (A13), from the Steelworkers Trilogy, *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), which were labor grievance cases decided under the National Labor Relations Act, not the Federal Arbitration Act. In that Trilogy, this Court, emphasizing the differences between arbitration of labor grievance disputes and ordinary commercial arbitrations, established a preference or presumption in favor of arbitrability *in the context of disputes between a union and employer*, ruling that any doubts as to the scope of arbitrable issues *under a collective bargaining agreement* must be resolved in favor of arbitration. Recently, this Court ruled that the presumption in favor of arbitrability articulated in the Steelworkers Trilogy for labor grievance disputes does not even extend within the labor environment to disputes between an employer and trustees of an employee-benefit plan, *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 373 (1984), thus manifesting that the presumption was never intended to be of general application outside the labor grievance context.

Here, in sharp contrast, the parties hotly disputed as a threshold question what the words of the parties' Subcontract said on the subject of arbitration. Waldinger asked the District Court, in ruling on whether the parties' disputes were arbitrable, to ignore the totality of the Subcontract, and instead to look only at the arbitration provision contained in Paragraph 17. Harkins contended that the Subcontract was intended to be and had to be reviewed as a whole, and, therefore, that the Court also had to consider Paragraph 2, which, in salient part, said (A8):

> *SUBCONTRACTOR* ***shall be bound*** *by* all provisions of these documents and also by applicable *provisions of the PRINCIPAL CONTRACT* [with the owner] *to which the CONTRACTOR is bound,* ***and to the same extent.*** [Italics and boldface added.]

Harkins asserted that Paragraph 2 was intended to limit Waldinger's rights and remedies under the other provisions of the Subcontract, including but not limited to Paragraph 17, so they would be no greater than Harkins' rights under the Principal Contract.[6] Thus, prior to even being able to address whether the scope of the parties' arbitration agreement encompassed the claims of the parties—the function which is the subject of the *Cone dictum* relied upon by Waldinger—the District Court here first had to engage in basic contract interpretation to determine what the arbitration agreement of the parties was, *i.e.,* whether the parties intended by Paragraph 2 for the provisions of the Principal Contract to limit Waldinger's rights and remedies under other provisions of the Subcontract. Neither *Cone,* nor any other case cited by Waldinger for the proposition that doubts as to the scope of an arbitration clause should be resolved in favor of arbitration, involved a court engaging in such contract interpretation.

Waldinger apparently recognizes this fundamental distinction between the instant case and the cases cited in its Petition, for time after time the Petition misstates both the

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[6] As previously noted, Waldinger now concedes that the claims being asserted by the parties would not be arbitrable under the Principal Contract. (Petition, 4).

language of *Cone* and the holding of the Third Circuit. Specifically, the Petition repeatedly accuses the Third Circuit of violating the purported "dictates" of *Cone* by allegedly holding "that district courts are not bound by *Cone* where in attempting to ascertain the *existence* and scope of an agreement to arbitrate the district court is 'interpreting the language of the contracts [and] performing a fact finding function.' " (Petition, 8; *see also, e.g.,* Petition, 7, 10, 13) (italics added). In fact, however, even apart from all of the other points discussed above with respect to Waldinger's reliance upon the language it quotes from *Cone,* neither that language, nor the language of any other case cited by Waldinger, ever said or suggested that in attempting to ascertain the "*existence*" of an arbitration agreement, courts must resolve doubts in favor of arbitration. Furthermore, the Third Circuit never said that the language of *Cone* did not apply where district courts construe the *scope of arbitrable issues* under a given arbitration agreement.

By erroneously suggesting that the *Cone* language it relies upon applies to a determination of even the "existence" of an arbitration clause, Waldinger seeks to greatly enlarge that *dictum* beyond its plain words to encompass the type of basic contract interpretation which the District Court below engaged in and the Third Circuit reviewed. The object of Waldinger's exercise is revealed at pages 11-12 of the Petition when Waldinger argues that the analysis of the District Court and Third Circuit necessarily entailed a finding that certain terms of the parties' Subcontract are ambiguous. From this premise, Waldinger argues that at the point of that doubt, *Cone* required the lower courts to resolve that doubt in favor of arbitration. However, if the lower courts found any doubt, it was not in construing the scope of arbitrable issues under the arbitration agreement, which is all that the *Cone dictum* speaks of, but in determining what was the arbitration agreement to be construed. Indeed, the interpretative function which the District Court had to perform had nothing to do with arbitrability *per se,* since no one has ever claimed that the critical language of Paragraph 2 which the District Court interpreted was intended to limit only arbitration rights under Paragraph 17. The Third Circuit noted that once the intent of the instant Subcontract's

provisions are interpreted, there can be no doubt as to the scope of arbitrable issues under the Subcontract. (A7). To suggest, as Waldinger does, that any time there might be some doubt in interpreting contractual provisions incident to identifying an arbitration agreement, a court must blindly and automatically rule in favor of arbitrability, not only would fly in the face of the black letter rules that arbitration is a creature of contract, and that a party cannot be required to submit to arbitration any dispute which he has not agreed to submit, *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), but would defeat the very purpose of the Federal Arbitration Act, which was not to willy-nilly make claims arbitrable, but to enforce agreements which parties have reached respecting the arbitration of disputes. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

In sum, regardless of whether or not the *Cone* language relied upon by Waldinger is *dictum* or a binding rule of law, the decision of the Third Circuit below is not in conflict with it.

4. THE STANDARD OF REVIEW EMPLOYED BY THE THIRD CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS

(a) Waldinger Mischaracterizes The Standard Of Review Applied By The Third Circuit

Waldinger's claim that a conflict exists between the decision of the Third Circuit and decisions of this Court or other Circuits as to the applicable standard of review is predicated upon a mischaracterization of the Third Circuit's decision.

Waldinger erroneously asserts that "[t]he majority below held that the District Court's *legal determination* concerning the *existence and scope* of an agreement to arbitrate consisted of contract 'interpretation' rather than contract 'construction' and was reviewable only pursuant to the clearly erroneous standard". (Petition, 13) (italics added). The Third Circuit made no such ruling. What the Third Circuit in fact held was the following (A7):

> We therefore conclude that the judicial task performed by the district court here was contract inter-

> pretation, i.e., determining the intent of the parties regarding arbitration. The Court was required to find as a fact what the contracting parties intended. It had to divine this intent from the language of the contract documents and any extrinsic evidence that went to the issue of intent. Once we review the district court's language interpretation, the legal operation of that interpretation on review follows easily. The proper standard of review has to be whether the district court's findings—interpretation of the contract, that is, the intent of the parties as to the meaning of the contract's language—are clearly erroneous. We hold that its interpretation is not clearly erroneous.

As is evident from the above comparison of the actual ruling of the Third Circuit and Waldinger's mischaracterization of it, Waldinger is again confusing two entirely different functions performed by the District Court: (1) determining what the parties meant by Paragraph 2 of their Subcontract in order to identify the terms of the arbitration agreement, and (2) determining the operation and effect of the parties' arbitration agreement upon the facts and issues presented. Thus, as the Third Circuit discussed and explained (A4-A7), the first function, *viz.* determining what the parties understood and intended by disputed Paragraph 2 of their Subcontract, is a factual matter of contract interpretation. The second, *viz.* determining the legal operation or effect of the arbitration agreement, as interpreted, in light of the facts of the case and the applicable law, is a matter of contract construction, which is a legal determination. Waldinger ignores the factual issue it created below in denying that the parties intended the critical provision of Paragraph 2 of the Subcontract ("SUBCONTRACTOR *shall be bound* by . . . applicable provisions of the PRINCIPAL CONTRACT to which CONTRACTOR is bound, *and to the same extent")* to limit Waldinger's rights and

remedies under the Subcontract.[7] The decision of the Third Circuit makes plain that it was only the function of contract interpretation performed by the District Court which was reviewed under the clearly erroneous standard applicable to factual determinations. See Fed.R.Civ.P. 52(a) ("Findings of fact, whether based on oral *or documentary evidence,* shall not be set aside unless clearly erroneous") (italics added). The ultimate and only legal determination by the District Court —whether the disputes of the parties are within the scope of arbitrable issues under the provisions of the Subcontract, as interpreted—was not reviewed under the clearly erroneous standard. However, as the Third Circuit noted, "[o]nce we review the district court's language interpretation, the legal operation of that interpretation on review follows easily." (A7). Indeed, Waldinger now concedes that point as well.

(b) There Is No Conflict Between The Decision Of The Third Circuit And Decisions Of This Court Or Other Circuits As To The Applicable Standard Of Review

Waldinger's contention that the standard of review applied by the Third Circuit conflicts with that required by this Court's decisions in *Cone* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 105 S.Ct. 3346 (1985), and with the standard applied by other Circuits, is without merit and based upon a misreading of the cases cited.

Waldinger's claim that this Court in *Cone* "endorsed" the Fourth Circuit's "*de novo* inquiry into the question of arbitrability" (Petition, 14) is erroneous and, in any event, irrelevant to the issue of the proper standard of review. It is erroneous because this Court gave no such "endorsement", but rather ruled that "we are not disposed to disturb the court's

[7] If the arbitration provision in Paragraph 17 had begun with words from Paragraph 2, *i.e.,* "To the same extent provided by the provisions of the Principal Contract," Waldinger would never have even been able in good faith to take the position that the parties' disputes are arbitrable. However, in interpreting the Subcontract as a whole, it is apparent that is exactly how Paragraph 17 was intended to be read. The parties did not have to redundantly state that preface before every affected paragraph of the Subcontract.

discretion in its handling of the case in view of the special interests at stake and the apparent lack of any prejudice to the parties."[8] 460 U.S. at 29. More importantly, the Fourth Circuit did not review any substantive determination on the issue of arbitrability by the District Court, because the District Court had made none. The only action the District Court took was to stay the action before it in deference to a parallel action in state court. Thus, this Court's affirmance of the Fourth Circuit's decision in *Cone* is wholly inapposite to the issue of the standard of review of the decision of the District Court in this case.

Waldinger's citation of *Mitsubishi* as another decision of this Court with which the Third Circuit's Opinion purportedly conflicts, and Waldinger's statement of that case, also widely miss the mark. Contrary to Waldinger's contention, this Court in *Mitsubishi* did *not* "endorse the First Circuit's *de novo* inquiry into the scope and operation of an arbitration clause previously reviewed, analyzed, construed and interpreted by the District Court." (Petition, 15). The standard of review that the First Circuit had applied was not, from all that can be determined from this Court's Opinion, raised as an issue before this Court, and certainly was never addressed by this Court.

The nature of Waldinger's confusion is revealed by its quotation of and emphasis upon (Petition, 16) this Court's statement in *Mitsubishi* that:

> [T]he Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. We endorse its rejection of Soler's proposed rule of arbitration clause construction.

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[8] The party that had been opposing arbitrability in *Cone* did not contest in this Court the Circuit Court's ruling on arbitrability. 460 U.S. at 29.

What Waldinger overlooks is that this Court had previously stated that its consideration of the First Circuit's decision was limited to the question of the *legal effect* of the parties' arbitration agreement, as interpreted:

> At the outset, we address the contention raised in Soler's cross-petition that the arbitration clause at issue may not be read to encompass the statutory counterclaims stated in its answer to the complaint. *In making this argument, Soler does not question the Court of Appeals' application of ¶ VI of the Sales Agreement* [the arbitration clause] *to the disputes involved here as a matter of standard contract interpretation.*[13] *Instead, it argues that* ***as a matter of law*** a court may not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs "unless [that party] has expressly agreed" to arbitrate those claims, . . . by which Soler presumably means that the arbitration clause must specifically mention that statute giving rise to the claims that a party to the clause seeks to arbitrate. See 723 F.2d at 159.
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> 13. *We therefore have no reason to review the Court of Appeals' construction of the scope of the arbitration clause in light of the allegations of Soler's counterclaims. . . .*

105 S.Ct. at 3353 (italics and boldface added).

In sum, in "endorsing [the First Circuit's] rejection of Soler's proposed rule of arbitration-clause construction," this Court was endorsing only the rejection of a proposed rule of law which would automatically exclude arbitration of claims arising out of statutes unless the arbitration agreement specifically mentions the statute giving rise to the claim, and was not addressing or endorsing any standard of review.

Even apart from the fact that this Court's Opinion in *Mitsubishi* does not address the issue of the standard of review, a critical distinction exists between *Mitsubishi* and this case.

Contrary to Waldinger's contentions, *Mitsubishi* did not involve any contractual interpretation issue as to what the terms of the arbitration agreement were. The arbitration agreement was set forth in Paragraph VI of the Sales Agreement, and there was no contention that the parties intended for any other provision of the parties' agreements to enlarge, restrict or otherwise modify what was stated in Paragraph VI. Thus, in reviewing the question of arbitrability, the First Circuit, as this Court noted and as the First Circuit's Opinion reveals, only conducted a two step inquiry of (1) comparing the undisputed language and intent of Paragraph VI to the nature of the claims asserted to determine whether the arbitration agreement encompassed such claims, and then (2) considering whether legal constraints external to the parties' agreement, as, for example, whether antitrust claims are arbitrable as a matter of law, foreclosed the arbitration of those claims. It was these ultimate or legal determinations that the First Circuit reviewed *de novo.*

In the instant case, the Third Circuit similarly reviewed *de novo* the question of whether the parties' arbitration agreement, as interpreted by the District Court, encompassed the claims being asserted by the parties, and that determination is not challenged here. The Third Circuit did not have to conduct *Mitsubishi's* second inquiry of considering external legal constraints, since none were suggested by the parties. However, in sharp contrast to *Mitsubishi,* the Third Circuit here had to conduct an inquiry preliminary to those two steps, *i.e.,* review of the District Court's finding, based upon the evidence submitted, of the disputed contract interpretation issue of what the arbitration agreement in the Subcontract said. It was to that finding, and only to that finding, that the Third Circuit applied the clearly erroneous standard of review, a standard which cannot conflict with any holding of *Mitsubishi* because that issue was not involved in *Mitsubishi.*

Explo, Inc. v. Southern Natural Gas Co., 788 F.2d 1096 (5th Cir. 1986), and all of the other appellate decisions cited at page 6 of the Petition as purportedly being in conflict with the Third Circuit's decision here, are inapposite and distinguishable for precisely this same reason. Upon review of those cases, it is

apparent that all Waldinger demonstrates by its out-of-context, parenthetical quotations is occasional lack of precision by the courts in use of the terms "interpretation" and "construction", for it is clear that none of those cases involved review of a threshold factual finding as to what parties understood and intended their contract to say on the subject of arbitration.[9]

(c) In This Case, The Standard Of Review Was Not Material To The Third Circuit's Decision

Finally, in the context of this case, it is academic whether the Third Circuit should have applied the clearly erroneous standard, or, as Waldinger contends, a *de novo* standard in reviewing the District Court's interpretation of what the parties' arbitration agreement said.

Under the clearly erroneous standard which it employed, the Third Circuit could have reversed if it had found the District Court's interpretation of the Subcontract "wholly implausible", *i.e.*, contrary to the only possible view of the evidence. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985). However, if it had reviewed the District Court's decision under a *de novo* standard of review, the Third Circuit similarly could have altered the trial judge's interpretation only if it found, as a matter of law, that the Subcontract was subject to only one reasonable interpretation, which was different from the District Court's. *E.g., Matter of Barclay Industries, Inc.*, 736 F.2d 75 (3rd Cir. 1984).

In short, the standard of review was not determinative of the outcome of the issue reviewed since, if the Third Circuit would have been prepared to say that the interpretation was in error as a matter of law, it would have found the District Court's interpretation to be clearly erroneous.

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[9] Given the seemingly unique contractual language at issue here, and also Waldinger's inability to cite any cases on point, it would appear that this issue is unlikely to recur—yet another reason for denying the Petition.

5. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS CONCERNING CONTRACT PROVISIONS INCORPORATED BY REFERENCE

In the last section of its Petition (pp. 19-23), Waldinger erroneously argues that the Third Circuit's Opinion is in conflict with decisions of other Circuits with respect to the effect upon a subcontract of provisions incorporated by reference from a principal contract.

This final contention misapprehends or overlooks several central points. The critical provision of Paragraph 2 of the Subcontract does not say that it is incorporating the terms of the Principal Contract by reference, as does every case cited by Waldinger. Rather, Paragraph 2 contains a positive command ("shall be bound . . . to the same extent") making Waldinger's rights and remedies under the general provisions of the form Subcontract, which Harkins employs on every project, subservient to the rights and remedies provided by the Principal Contract. The District Court found as a fact from Waldinger's own conduct in the negotiations of the Subcontract (A49-A51), and from Harkins' affidavit (A48-A49), that both parties so understood the meaning and intent of Paragraph 2.[10]

Thus, since the right to arbitration is strictly a matter of contract, it is subject to and determined by the agreement of the parties, *Steelworkers v. Warrior & Gulf Navigation Co., supra,* not what other parties might have been found to have done in a different contract on a different project. On these, and other

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[10] Although Waldinger now objects to Harkins' affidavit, it raised no objection before the District Court, and in fact was the first to file an affidavit with respect to the arbitration motions before the District Court. In any event, the affidavit was proper and admissible as evidence, *inter alia*, of a relevant usage which Harkins attached to Paragraph 2 and of which Waldinger had knowledge as evidenced by the additional language which it caused to be added to Paragraph 2 by amendment (A49-A51), *see* Restatement (Second) Contracts § 220, and of relevant circumstances and practices in the industry to which the Subcontract pertained, *see* Restatement (Second) Contracts § 222.

grounds as well, the cases cited by Waldinger are all distinguishable from and not in conflict with the Third Circuit's decision here.[11] Similarly, the Opinions of the lower courts in this case have no impact on arbitration or other provisions in other contracts, as those Opinions stand for no more than a factual finding, based upon the facts shown, of what these two private parties intended and agreed upon with respect to arbitration in their unique private contract.[12]

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[11] Waldinger has argued below that the language in this Subcontract binding the subcontractor by the terms of the contract with the owner "to the same extent" as the contractor also appeared in the subcontract in *Perry v. United States*, 146 F.2d 398 (5th Cir. 1945). However, a careful reading reveals *Perry* to have said that the contractor in that case argued that that was *the effect* of the language in the Subcontract, not that it was the language of the subcontract itself.

[12] Waldinger's contention that the District Court's interpretation of the Subcontract negates and renders Paragraph 17 nugatory is erroneous, since Paragraph 2 was only directed to the subcontractor. It was Waldinger's amendment to Paragraph 2 which similarly limited Harkins' rights and remedies *vis-a-vis* Waldinger which resulted in the particular claims asserted below by both parties being nonarbitrable.

CONCLUSION

For all of the above reasons, Harkins respectfully submits that the Petition for a Writ of Certiorari should be denied.

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